

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:) 1998 OAL Determination No. 23
Request for Regulatory)
Determination filed by) [Docket No. 91-028]
BARRY WILLIAM ALLEN)
regarding the DEPARTMENT) September 28, 1998
OF CORRECTIONS, PELICAN)
BAY STATE PRISON rules) Determination Pursuant to
limiting visitations to 12) Government Code Section
hours per week, charging 15) 11340.5; Title 1, California
cents for legal copying, and) Code of Regulations,
confiscating inmate property¹) Chapter 1, Article 3
_____)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
TAMARA J. PIERSON, Administrative Law Judge on
Special Assignment
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") has been requested to determine whether rules at one particular state prison (concerning visiting hours, legal copying, and personal property) are "regulations," and are, therefore, without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that these rules are not "regulations" for purposes of the APA because they apply solely to inmates at one particular prison; thus, they need not be adopted pursuant to the APA.

ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether the rules of Pelican Bay State Prison ("PBSP") which:

- (1) Limit visiting hours to 12 hours per week on Saturdays and Sundays,
- (2) Charge inmates 15 cents per page for legal copying, and
- (3) Allow PBSP to confiscate the "unapproved" personal property of an inmate,

are "regulations" required to be adopted pursuant to the APA.²

ANALYSIS

Barry William Allen was an inmate at Pelican Bay State Prison ("PBSP"). On August 29, 1991, he requested a determination whether the rules enumerated above, which vary from the provisions of the Department of Corrections' Operations Manual ("DOM"), are invalid since they were not adopted in compliance with the APA.

Mr. Allen contends the DOM provides:

- (1) Inmates are entitled to a minimum of 20 hours visitation per week,
- (2) The charge for copying is to be 10 cents per page, and
- (3) That inmates have the opportunity to mail "unapproved property" home rather than have it confiscated.

He contends PBSP's rules are more restrictive than the DOM provides and he argues that these rules are regulatory in nature, but have not been adopted in compliance with the APA.

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and

regulations *shall be promulgated and filed pursuant to [the APA]. . . .*
[Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.³ After this request was filed,⁴ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements. [See section 5058, subdivisions (c)⁵ and (d)]. The applicability of one of these exemptions will be discussed below.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁶ the California Court of Appeal upheld OAL's two-part test⁷ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁸

A. ARE THE CHALLENGED RULES A "STANDARD OF GENERAL APPLICATION?"

Standard of General Application--Rules Applying to Prisoners

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁹

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.¹⁰ In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),¹¹ a case which overturned a trial court

order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from* the *institutional rules* enacted by each warden of the particular institution affected. [Emphasis added.]¹²"

Procunier is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 specifically making the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated by the Director" (emphasis added), were subject to APA requirements.¹³ The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in

the particular prison or other correctional facility to which the rules apply and to all members of the general public.

[Emphasis added.]”

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

The challenged rules do not apply statewide

In his request for determination, Mr. Allen specifically refers to the rules governing the inmates of PBSP.¹⁴ He argues that the rules are in conflict with the provisions of the DOM,¹⁵ which he believes is supposed to apply to all inmates in the California correctional system.¹⁶ OAL’s authority does not extend to determining whether the challenged rule is consistent with DOM. OAL’s authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5.

The rules challenged by Mr. Allen, which govern the inmates of PBSP, are not “regulations” within the meaning of the APA because they are not rules or standards of *general* application; that is, they do not apply to inmates statewide. They are “local” rules applying solely to one particular prison.

Since the challenged rules do not meet the first part of the two-part test, it is not necessary to address the second part of the test.

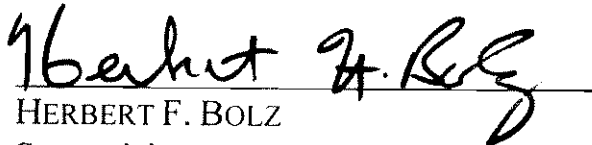
CONCLUSION

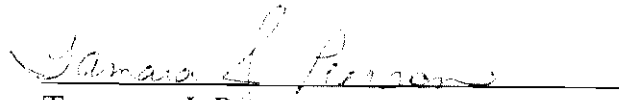
For the reasons set forth above, OAL finds that the Pelican Bay State Prison rules which:

- (1) limit visiting hours to 12 hours per week on Saturdays and Sundays,
- (2) charge 15 cents per page for legal copies, and
- (3) allow for the confiscation of an inmate's personal property when it is "unapproved."

are not "regulations" within the meaning of the APA, and thus do not violate Government Code Section 11340.5.

DATE: September 28, 1998


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ENDNOTES

1. This Request for Determination was filed by Barry William Allen, E-04244/A4-128L, P.O. Box 7500, Crescent City, CA 95532. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
4. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
5. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
6. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years

earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* court, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

7. The *Grier* court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

8. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
9. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
10. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections and of the particular institution. . . .") (Emphasis added.)
11. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
12. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.

13. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that a particular chapter of the Department of Corrections' statewide Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions are exempted from certain provisions of the guidelines involved here, the guidelines at issue (1) were adopted by the Director of the Department of Corrections and (2) are of *general* applicability." (Emphasis added.) (720 F.2d at 1135, n. 2.)

14. In the portion of the request for determination which concerns the confiscation of personal property, Mr. Allen states:

". . . This policy is in total violation of the D.O.M. section 54030.15, which clearly states that an inmate has several options including but not limited to sending the property home. Pelican Bay State Prison ignores this section of the D.O.M. (*Also other prisons such as Calif. Correctional Center*). They force the inmate to sign an agreement stating that they allow the R&R Sgt. to confiscate personal property that they feel is not allowed in their prison." [Emphasis added.]

Mr. Allen believes other prisons are using this same rule regarding confiscation of an inmate's personal property. However, all of the documentation submitted with his request for determination came from PBSP. He provided nothing to substantiate that this is anything other than a local rule of PBSP.

The Department's response does state that section 54030.15 of the DOM has *not* been authorized for use. The Department points out that *confiscation* of "unapproved personal property of an inmate" *is permitted* pursuant to Title 1, CCR, section 3006 and PBSP was acting in accordance with this section of the CCR.

15. In its response, the Department ("CDC") reports that, to comply with the unpublished decision of the 5th Appellate District, in *Tooma v. Rowland*, Case No. F015383 (1991), CDC has *not* "cleared for use" DOM sections 54020 on "Visiting" and 54030.15 providing several alternatives for the disposal of inmates "unapproved property"; therefore, there are no DOM sections which conflict with PBSP's local rules

on these subjects. These sections still appear in the DOM, but staff have been instructed through administrative bulletins not to use these sections.

There is no request for determination focusing on whether sections 54020 and 54030.15 of the DOM are "regulations" within the meaning of the APA, or whether these rules violate section 11340.5 in that they have been issued, but not removed from the DOM. There is no allegation in this case that departmental employees continue to use these sections of the DOM in contravention of instructions to staff not to use them.

CDC has instructed staff to use "local rules" implemented by their individual institutions in these matters and it is PBSP's use of local rules, rather than the sections of the DOM, which is challenged in this request for determination.

16. DOM section 51020 establishes the process for facilities to "supplement" the existing DOM sections for local operational purposes. Thus, the DOM provides for variances by facilities and parole regions.